IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 7710 of 1999
WITH
CIVIL APPLICATION NO 14127 of 1999
AND
CIVIL APPLICATION NO 9031 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BANSILAL KANAIYALAL SHAH

Versus

BR SHROFF

Appearance:
MR YATIN SONI for Petitioners

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE K.M.MEHTA

Date of decision: 17/10/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE J.N.BHATT)

1. By this appeal under Section 96 of the Code of Civil Procedure, 1908 (C.P.C.) the appellants original defendants nos. 2 and 3 have challenged the legality and validity of the judgment and decree recorded by the Civil Judge [S.D.] Nadiad in Special Civil Suit No. 72/1997 on 5/11/1999 whereby the respondent no.1 original plaintiff came to be granted a decree of an amount of Rs.2,03,003/- with interest at the rate of 12% p.a.

2. During the course of hearing at the admission stage learned advocate appearing for the appellant has strenuously urged before us that the liability of the appellant no. 2 original defendant no. 3 cannot be fascened as a guarantor as he was never a guarantor in the loan transaction. In support of his submission at the admission stage he has presented before us the copies of the entire testimonial and oral evidence which we have gone through. We have also heard the lelarned advocate for the respondents at length and after having heard and considering the evidence on record, we find that the submissions raised before us are quite meritless and the appeal is required to be dismissed at the threshold.

3. The respondent no.1 is original plaintiff, whereas appellants nos. 1 and 2 are the original defendants nos. 2 and 3 and respondent no. 1 is original defendant no. 1. For the sake of convenience and brevity they are hereinafter referred to as they are arrayed in the trial Court. The plaintiff firm had to institute legal battle for recovery of an amount of Rs.2,03,003/- as the defendants failed to honour the contractual commitments and failed to pay the loan amount despite repeated demands and requests made by the plaintiff firm, which is a financial partnership firm.

4. There is no dispute about the fact that the defendant no. 1 is a registered partnership firm and doing business. For the purpose of business a cash credit account no. 23 was opened with the plaintiff firm and on 27/1/1997 an amount of Rs.1,00,000/- and on 21/3/1997 again an amount of Rs.1,00,000/-, inall thus an amount of Rs.2,00,000/- were advanced by the plaintiff firm to the defendants. The amount was paid by cheque bearing no. 040189 and 044763 of Petlad Nagrik Cooperative Bank. In lieu thereof two hundies nos. 0201 and 0231 were executed by the defendant firm and the defendants nos. 2 and 3 stood as guarantors or sureties. Not only that they had also executed demand promissory

note under which the rate of interest was contractually agreed to be paid to the tune of 18% p.a. Upon amount having become due the same was demanded and it was not returned. Repeatedly the claim was made, but it was never paid. That is the reason the suit came to be filed in the Civil Court at Nadiad being Special Civil Suit No. 72/1997.

5. The defendant no. 1 partnership firm resisted the suit by filing written statement, at exh. 26. It is admitted in the written statement that there was cash credit account of defendant partnership firm being account no. 23 and the amount of Rs.2 lacs being Rs.1 lac each in the form of cheques were received and deposited and followed by the execution of the demand promissory notes. However, since there was business slackness and the crysis in the market, the business of the defendant firm was closed. So the non-payment of the dues claimed in the suit and decree by the trial Court are not denied by the original defendant no. 1 firm.

6. Whereas defendants nos. 2 and 3 by raising the contention that they are not the guarantors, they filed separate written statement exh. 18. It was also contended that the suit is barred by the provisions of Money Lenders Act. As the plaintiff financial firm having no money lending licence, they denied to have entered into any contract of guarantee. The rate of interest was also denied. It will be interesting to note at this stage that later on in the written statement original defendant no. 2 admitted that loan of Rs.1 lac was taken and not Rs.2 lacs and he has become guarantor to the extent of Rs.1 lac. Therefore, defendant no. 3 has admitted that he is the guarantor in respect of an amount of Rs.1 lac and not Rs.2 lacs as claimed in the suit. Unfortunately the defendant no. 3, son of defendant no.2, denied the total liability. He denied to have executed demand promissory note. He denied to have become the guarantor.

7. In view of the facts and circumstances and the pleadings of the parties and considering the material averments in the pleadings, the trial Court raised the following issues :-

(i) Whether the plaintiff proves that suit claim as alleged ?

(ii) Whether the plaintiff entitled to get interest as alleged ? If yes, at what rates and since when.

(iii) What is found due ?

(iv) What order and what decree ?

8. Dealing with the facts and circumstances of the case and upon evaluation and the assessment of the evidence of the parties, the trial Court answered all the aforesaid issues in the following way :-

(i) In the affirmative.
(ii) In the affirmative. Interest at 12%.
(iii) Rs.2,03,003/-.
(iv) As per final order.

9. The vehement contention before us on behalf of the present appellants at this stage is that the original defendant no. 2 was never a party as a guarantor in respect of second loan amount of Rs.1 lac and the original defendant no. 3 was never a party in executing the demand promissory note and he had never stood as a guarantor of the said transaction. It was also contended that on account of inadvertence and mistake before the trial Court the evidence of expert witness like hand writing expert was not led and, therefore, permission should be granted to led such an evidence exercising our powers under Order 41 Rule 27 of the C.P.C. A separate application in this behalf has been submitted before us alongwith appeal. After the judgment was pronounced and decree was passed, the defendants nos. 2 and 3 appellants before us in this appeal, obtained an opinion of the hand writing expert and the copy of the such report has been placed on record alongwith an application for additional evidence. It was, therefore, vehemently contended that merely because party on account of inadvertence or apathy on the part of defence failed to lead evidence of expert witness like hand writing expert should not come in the way of justice being done. It was therefore, submitted that the application for leading additional evidence should be granted.

10. Firstly the contentions raised before us are required to be rejected in toto. On plain perusal of the entire testimonial and documentary evidence led by the plaintiffs a different version is raised at different stage by the defendants. Initially the liability was denied even by the defendant no.1 registered partnership firm which was dealing with business. Subsequently it was stated that the partnership firm had taken advance for the purpose of Hundi from the plaintiff financial

firm. So in so far as the original defendant no. 2 is concerned, he has filed separate written statement and initially he contended that he is not the guarantor and he has not executed any document. Later on he changed his version, who is the father of the defendant no. 3 and contended that he is a guarantor only to the extent of liability of amount of Rs.1 lac and not Rs.2 lacs as claimed by the plaintiff. Whereas defendant no. 3 has raised totally contradictory version. He has denied the liability on the ground that he was never guarantor and he had never executed any document in support of advance received by the partnership firm.

11. Apart from the conduct of the defendants the documentary evidence and the testimonials which were placed at our disposal in support of the submissions raised before us on behalf of the appellants unequivocally opposite to the contentions raised before us. It has been established without any doubt that the partnership firm - original defendant no. 1 which was dealt with the business for the purpose of honouring Hundi had taken amount of Rs.2 lacs on different occasions by account payee cheque drawn on a cooperative bank. So the defendant partnership firm had taken the money from the plaintiff firm and the defendant no. 2 is the father of defendant no. 3 - son. Both of them have been found to have executed demand promissory note. They had also executed the writing as guarantor. The trial Court has, therefore, rightly placed reliance on the documentary evidence in support of the version of the claim made in the plaint and the evidence of the plaintiff - firm.

12. Ot os successfully borne out from the evidence on record that defendant no. 1 firm had taken Rs.2 lacs as a loan under the promissory note and Hundies. The firm had accepted 2 cheques of Rs.1 lac each on 17/1/1997 and 21/3/1997 respectively which were deposited in their accounts. It has been successfully established that defendant no. 1 partnership firm had taken loan of Rs.2 lacs from the original plaintiff firm. The findings recorded by the trial Court is quite justified and supported by documentary evidence apart from the oral version. Not only that the defendants nos. 2 and 3 who are father and son had also executed the demand promissory note. The signatures in the demand promissory note are proved. They were executed in the present of two witnesses. In other words the demand promissory notes signed by defendants nos. 2 and 3 have been attested by two witnesses, who are independent persons. The demand promissory note agt exh. 47 is signed by the

guarantors defendants nos. 2 and 3 and also by the partner of the defendant no. 2 firm. Though specific contention has been advanced that defendants nos. 2 and 3 were never the guarantors, it was partly given up by the defendant no. 2 who is the father of defendant no. 3. In so far as defendant no. 3 - son of the defendant no. 2 is concerned, he has totally denied his liability for payment of dues as a guarantor contending that he had never signed the guarantee deed or any document muchless the promissory note. Exh. 46 is the agreement between the parties signed by all and the exh. 47 is the demand promissory note. The signatures in both these documentary evidence exh. 46 and exh. 47 are identical and similar. They are proved to be in the hands of defendants nos. 1 and 2 in course of the evidence of the plaintiff. It was, therefore, necessary for the defendant no. 3, if not defendant no. 2 to lead the evidence and to show that his signature was forged and manipulated. Trial Court therefore, has rightly observed that there was an opportunity on the part of the defendants to lead evidence of hand writing expert and substantiate the version of forgery. Be as it may. It is admitted fact that the defendants nos. 2 and 3 have not led any evidence except the denial in support of their contention that they were never parties in the documents exh. 46 and exh. 47.

13. It is in this context now an application for additiona, evidence under Order 41 rule 27 of the C.P.C. being Civil Application No. 9031 of 2000 came to be submitted for leading the evidence and placing the expert opinion of hand writing. While there are certain parameters for proving the case before the trial Court. If a party fails to prove or disprove any version before the trial Court turns round and contends in the appeal under the guise of Order 41 Rule 27 of the C.P.C. that the additional evidence of hand writing expert should be permitted since it was obtained after disposal of the whole suit. In support of their original version which could have been done before the trial Court, cannot be permitted otherwise also in view of the statutory mandate prescribed and incorporated in Order 41 Rule 27 of the C.P.C.

14. The additional evidence in terms of Order 41 Rule 27 of the C.P.C. is permissible only in certain fact situation and in the light of certain parameters. It is true that the appellate Court is empowered to permit to adduce the additional evidence and can permit the production of additional evidence even though the appeal is filed is nothing but continuation of the original

suit. At this stage it would be therefore necessary to glance at purpose and policy of provisions of Order 41 Rule 27 of the C.P.C. It reads -

"27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of duediligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

It could very wel be visualised from the statutory scheme incorporated in Order 41 Rule 27 that the production of evidence in the appellate Court is permissible only in certain facts, circumstances and contingencies. It is not a matter of right. It is not ipso-facto. On the contrary it is very clear from the opening words that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the appellate Court. However, following three contingencies are contemplated for permission to produce additional evidence and to prove it -
(i) If the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or, (ii) the party seeking to produce additional evidence establishes that notwithstanding the

exercise of due diligence, the evidence sought to be tendered at the appellate stage was not within his knowledge or could not be procured despite due diligence. (iii) Appellate Court if itself requires any document to be produced or any witness to be examined so as to enable the appellate Court to effectually and substantially pronounce the judgment or for any other substantial reason.

15. It could very well be seen from the aforesaid parameters prescribed in Order 41 Rule 27 of the C.P.C. that the case of the appellants original defendants nos. 2 and 3 does not fall in any one of the aforesaid criteria/parameters. There is no case that the trial Court had refused to pursuing the necessary documentary evidence or other evidence which was required to be admitted. So the first clause (a) (i) of Order 41 Rule 27 of the C.P.C. is not at all attracted in the present case. Again if we look at the clause (aa) also it would not be useful or could be pressed into service by the defendants for the simple reason that it is not case of the defendants that the opinion of the hand writing expert or report of such expert was available and could not be traced despite the exercise of due diligence. On the contrary after the conclusion of the suit followed by a decree under challenge before us in this appeal u/S. 96 of the C.P.C. and defendants nos. 2 and 3 got opinion of a hand writing expert so it is a documentary evidence which is sought to be produced under the guise of Order 41 Rule 27 of the C.P.C. at the stage of appeal, it is contended that on account of mistake, apathy or indifferenceness on the part of the party or advocate the hand writing expert could not be examined. Even if this contention is accepted to be true, then it does not fall in any of the aforesaid criteria/parameters prescribed in Order 41 Rule 27 of the C.P.C. It is not design and purpose of Order 41 Rule 27 to allow the party to fill up the gap or to fill the lacuna. Party must be vigilent. A party to a suit must be vigilent. During the course of the suit and till its conclusion if no effort is made in support of partivular version and when the trial Court has in clear terms observed that in order to substantiate the version of forgery in the agreement as well as in the promissory note exh.s. 46 and 47 which have been proved during the course of the evidence of the plaintiff, could have been substantiated by the defendants by leading evidence of hand writing expert and in not doing so the trial Court has criticised the attitude and approach of the defendants nos. 2 and 3. With a view to come out from this wood and to delay the proceedings in all probabilities, the defendant nos. 2

and 3 have come up alongwith the appeal invoking the provisions of Order 41 Rule 27 of the C.P.C. for permission to adduce additional evidence.

16. Two decisions have been relied upon on behalf of the appellants original defendants nos. 2 and 3. It is rightly said that drowning man would try to catch straw. The reliance is placed on the decision of the Hon'ble Apex Court rendered in the case of The Municipal Corporation of Greater Bombay v. Lala Pancham reported in AIR 1965 S.C. p. 1008. In support of the contention that the additional evidence at the appellate stage should be permitted to be produced in case of any mistake on the part of the advocate. After having examine the propositions laid down by Their Lordships in this decision, we fail to understand as to how this decision could bring about any capital in support of the contention raised before us. The provision of Order 41 Rule 27 of the C.P.C. is crystal clear, which prescribes three material parameters and the criteria or categories of cases under which the permission to produce the additional evidence at an appellate stage can be granted by the appellate Court exercising powers under Order 41 Rule 27 of the C.P.C.

18. On the contrary in our opinion the decision in Lala Pancham (supra) relied on by the appellants is running counter to the arguments advanced before us. It becomes crystal clear from the observations made by Their Lordships in para. 9. It is clearly observed that under Order 41 Rule 27 the appellate Court has a power to allow documents to be produced and a witness to be examined. But the requirement of said Court must be limited to those cases where it finds it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to lead fresh evidence at the appellate stage. Thus, the decision relied on does not in any way come to the rescue of the appellants.

19. Again the reliance is placed also in the case of Syed Abdul Khader v. Rami Reddy reported in AIR 1979 S.C. p. 553. It has been observed in the said case that it is well established that Order 41 Rule 27 of the C.P.C. does not confer right on the authority to produce additional evidence. This is precisely the case before us. It is the party who wants to lead additional evidence under the guise of a mistake or an apathy or indifferenceness on the part of it or its advocate. It is not the requirement of the Court. In this context it is necessary to mention that the Hon'ble Supreme Court

has further observed that at the hearing the Court again requires any document so as to enable it to pronounce judgment, it has jurisdiction to permit additional evidence to produce. We have failed to comprehend as to how the proposition of law laid down in Syed Abdul's case (supra) by the Hon'ble Supreme Court is of any help whatsoever to the appellants original defendants nos. 2 and 3. Therefore, both the decisions relied on by the appellants original defendants nos. 2 and 3 are of no avail and they are not in a position to make any capital out of it.

20. In our opinion, after having taken into account the overall facts and circumstances of the present case and the relevant legal propositions and statutory scheme in accordance with the provisions of Order 41 Rule 27 and the material of the appreciation of the evidence as per the Indian Evidence Act the attempt to seek the permission to lead the additional evidence with the help of provisions of Order 41 Rule 27 at the appellate stage is nothing but an after thought. What is use of it. It is not supported by statutory sense. A person who has taken an amount of Rs.2 lacs before, has not paid or responded and/or successfully proved of having executed guarantee in respect of loan transaction in relation to business dealing demand by original defendant no. 1 firm and the defendants nos. 2 and 3 who are father and son having executed a contract and the demand promissory note exhs. 46 and 47, the views and the ultimate conclusion recorded by the trial Court in passing the impugned decree and judgment could not be said to be erroneous which requires interference of the appellate Court under section 96 of the C.P.C. Therefore, we have no hesitation in holding that the appeal is absolutely meritless. Accordingly it is dismissed. Obviously, therefore the Civil Application for permission to lead additional evidence under Order 41 Rule 27 of the C.P.C. would not assume any survival value. The another Civil Application for stay would also not survive in view of the dismissal of the main appeal.

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PVR